



13 Nov 1765
P. Mary Dickson

NOVEMBER 13. 1765.

[Lord ELLIOCK Ordinary.]

To see

Unto the Right Honourable the Lords of Council and Session,

Muirhead 7 Feb: 1766

*Sustain the defence
of the positive pre-
scription. & Remit
to the Ord^y to
proceed accordingly*

T H E
P E T I T I O N
O F

MARY DICKSON, Relict of the deceast
George Muirhead of Whitecastle, now
Wife of Mr. John Noble, Minister of
the Gospel at Libberton, and of him
for his Interest ;

Humbly sheweth,

THAT in this year, John Muirhead, grandfather of 1655.
the said George Muirhead, obtained from the par-
son of Biggar, with consent of the Earl of Wig-
ton, patron of the parish of Biggar, a charter of
certain lands lying within the said parish, called Parson-lands,
and was thereupon infest.

That in this year, the said George Muirhead, the grandson 1711.
of this John Muirhead, was advised to make up his titles to
these lands, by taking a precept of *clare constat* from the
Earl of Wigton patron, as said is, of the parish, whereupon
he was infest in the said lands.

That

1748. That *George Muirhead* having, upon this title, posselt these lands without any challenge, from the 1711 to the 1748, did, in that year, make a disposition in favour of his wife the petitioner, of these *Parson-lands*, with the burden of his debts.

1751. That, in this year, *George Muirhead* died in the natural possession of these lands, which consist of but a few acres, the extent of which cannot possibly be ascertained; and his widow, the petitioner, continued his possession after his death, upon the title of the foresaid disposition, which she put upon record, before the summons in this process was executed against her, and is now infest in the lands, and upon the supposition, that she is proprietor of them, has paid off her husband's debts, to an amount exceeding the value of these lands.

That after the years of prescription were run, upon the infestment in the 1711, a challenge was brought of the petitioner's right, at the instance of *Margaret* and *Katharine Muirheads*, as heirs portioners of line, served and retoured to the said Mr. *John Muirhead* their grandfather; and, upon their death, the process was insisted in, at the instance of *Janet Millar*, *Isobel*, *Jean*, and *Janet Aikmans*, as heirs portioners of line, served and retoured to the said *Margaret* and *Katharine Muirheads*, upon this ground, that the Earl of *Wigton* was not the superior of these lands, but the king, as come in place of the parson of *Biggar*. That, therefore, the said *George Muirhead's* infestment upon the precept of *clare constat*, in the 1711, from the Earl of *Wigton*, was void and null, and, consequently, he could not grant the disposition above mentioned, in favour of the petitioner, of these *Parson-lands*, which continued still in *hereditate jacente* of the said *John Muirhead*, and so may be taken up by the pursuers, as heirs of line to him.

That against this action, fundry defences were pleaded for the petitioner; *imo*, That the Earl of *Wigton* was truly superior of these lands, as having belonged to the prebendary of the

the collegiate church of *Biggar*, of which the Earl of *Wigton* was patron. 2^{do}, That suppose he had not been superior, he had acquired a right to the superiority by prescription: And, in support of this plea, Lady *Clementina Elphinston*, as representing the Earl of *Wigton*, appeared in the field. And, 3^{tio}, That *George Muirhead*, and his disponee the petitioner, having possessed forty years upon the infeftment in the 1711, had thereby acquired a right by prescription to the property of the said lands.

That upon these defences, your Lordships did, of this date, pronounce the following interlocutor: "On report of ^{Aug 6th, 1765.} Lord *Elliock*, the Lords find, that the lands in question "held of the parson of *Biggar*, *qua* parson; and that the "precept taken, and title made up by *George Muirhead*, in "the year 1711, was erroneous and void; repel the defence "of prescription, and decern; superseding extract till the "20th day of *November* next."

The petitioner proposes only to lay before your Lordships the last part of this interlocutor, repelling the defence of prescription of the property, by 40 years possession upon the precept of *clare constat*, and infeftment in the 1711, which she is advised is a point of great consequence to the law of this country.

And, in the *first* place, none of your Lordships had any doubt, but that the sasine in the 1711, with the warrant of it produced, *viz.* the precept of *clare constat*, was a good title of prescription, as good as a sasine upon a charter or disposition; and, consequently, that the possession could be continued and completed by a singular successor, tho' not infeft. But what seemed to move your Lordships to pronounce the above judgment, was, that there was no person here, against whom the prescription could run, except the heirs of line of *George Muirhead*: That altho' a man might prescribe against his heir of tailzie, and thereby get free of fetters,

fetters, yet he cannot prescribe against his heir of line, any more than against himself.

The consequence of this doctrine is, *1mo*, That if *George Muirhead*, his son, grandson, &c. for some hundreds of years, had possessed these lands upon the same title, they could not have acquired by prescription the right of disposing of them gratuitously.

But that is not all; for, *2do*, If *George Muirhead*, or his heirs, tho' standing infeft in these lands for never so many years, and possessing them peaceably, had sold the lands, or granted an heritable bond upon them, such sale, or heritable bond, must have been declared void and null at the instance of the next heir, taking up the succession as heir to *John Muirhead*, who was infeft in the 1655: For that your Lordships decision must go to this consequence, is clear; because, if *George Muirhead*, or his heirs possessing upon the same title, had no good right, either originally, or by prescription, it is plain that they could give no right either to purchaser or creditor: And altho' their debts would be effectual by the correctory statute 1695, yet the disposition and infeftment of the purchaser, and the heritable bond to the creditor, would give no right to the lands, as proceeding *a non habente*.

Your Lordships will be apt to suspect, that the principles which lead to such consequences, are not solid: And altho' such a doctrine might be founded in strict and subtle reasoning, your Lordships would not be disposed to adopt it, when it leads to such dangerous consequences.

But the petitioner hopes to show your Lordships, that it is not founded on good principles, and that your Lordships may be free of all the consequences attending it, and at the same time, preserve the system of law entire and unshaken.

And, in the *first* place, the prescription that is supposed here, agrees to the definition of prescription, being an *ad-jectio*

jectio domini per continuationem possessionis; for it is clear, that *George Muirhead* was not, nor could not be proprietor of the lands, till he was infeft as heir to his predecessor: And if that infeftment was void and null, as is supposed in this argument, he could not otherways acquire the property than by prescription; for your Lordships know very well, that an heir unentered, has only a right to possess and uplift the rents, but is not proprietor by the law of *Scotland*; according to which, *mortuus non facit vivum*.

The question then is, What should have hindered *George Muirhead* to have acquired that property which he wanted, by possession upon what all your Lordships acknowledge was a just title of prescription? The answer is, 'That he could not prescribe against his own heirs of line, the pursuers.

And indeed it is true, that prescription against a man's own heir at law, cannot well be understood, any more than prescription against a man's self: For, *cui bono* such a prescription? What right could he acquire by it; as his heir of line would be obliged to make effectual every deed of his, whether onerous or gratuitous? But the mistake, in the petitioner's apprehension, lies here, that the prescription, in this case, did not run against the heirs of *George Muirhead*, but against the heirs of his grandfather: For your Lordships will observe, that, upon the supposition of his dying in a state of apparency, the heirs of the grandfather *John Muirhead*, can only take up these lands by service to him; and accordingly, the pursuer's title in this process, is a service to *John Muirhead*. And tho' the heirs of *George Muirhead* be the same persons with the heirs of *John*; yet that does not vary the principle of law; and it is still true, that they now claim the subject, not *qua* heirs of *George*, (for, if so, they could not challenge his disposition to the defender) but *qua* heirs of the remote predecessor, to whom they served. Now, altho' a man cannot prescribe against his

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own heir, he certainly may prescribe against the heir of his grandfather, or any other predecessor, and thereby acquire to himself a liberty of disposing of the subject, *even gratuitously*, in the same manner as a man, by prescribing against his heir of entail, acquires to himself the free disposal of the subject.

It was further said, that the pursuers here, the heirs of *John Muirhead*, were *non valentes agere* to interrupt this prescription, because they could have brought no effectual action for evicting this subject from *George Muirhead*.

But to this it is answered, *imo*, That tho' such *valentia agere* is found by some decisions to be necessary in the case of the negative prescription, as in the case of a bond liferented by a wife; the prescription of which is not found to run against her *stante matrimonio*, because she is not, during that time, *valens agere*; yet, it is not required by any statute or decision in the case of the positive prescription, which your Lordships know is founded upon different principles, and introduced by different statutes: For the foundation of the negative prescription is the negligence of the creditor in not making a demand during the forty years; and therefore, it has been held to be a good excuse, if, during any part of that time, he was not *valens agere* for recovery of the debt; as in the case above mentioned of a wife during coverture. And even with respect to this prescription, it has been thought so salutary a remedy for quieting mens minds, that it was once found in a case mentioned by *Spotiswood*, under the title *Prescription*, that the prescription of a bond run from the date, and not from the term of payment, 18th of *March* 1634, *Slowan contra Simpson*; tho' certainly, before the term of payment, there was an absolute *non valentia agere*. But the positive prescription stands upon a quite different footing, *viz.* possession upon a proper title for forty years. And the statute which introduces it, *viz.* act 12th 1617, has expressly declared, that such a possessor shall not be troubled nor inquieted by

by any person pretending a prior infestment; “nor upon
 “no other ground, reason or argument competent of law, except
 “for falsehood:” And without making any distinction whether the true proprietor was negligent or not in the prosecution of his right, and whether, during any part of the forty years, he was *non valens agere*: Nor is there any other stop to this prescription mentioned in the act, except minority. And even with respect to minority, it has been disputed, as your Lordships know, that this exception in the act only related to the negative prescription, because the positive is founded on a presumption *juris et de jure*, that the possessor had prior evidence, which had been destroyed by the injury of time, as the statute says, or by war, fire, or plague, or such like occasions; against which presumption, minority avails nothing. And tho’ it be now established in practice, that the years of minority are to be deduced from the years of the positive as well as the negative prescription; there is no case, so far as the petitioner knows, where it was found, that such a *non valentia agere* as is here pleaded, stoppt the the course of positive prescription.

And the distinction in this matter, betwixt the positive and negative prescription, was expressly made by your Lordships in a case observed by *Fountainhall*, 31st December 1695, *Innes contra Innes of Achluncart*, and which resembled this case very much: For there, a tailzie had been made in favour of the heirs male; but the heir male, who was the same with the heir at law, made up his titles to the estate upon the investiture, which was in favour of heirs whatsoever, neglecting the entail; and in this way the estate was possessed for some generations, till at last the heir male, and the heir at law, came to be different persons, and then the heir male claims upon the tailzie. Both the positive and negative prescriptions were objected to him; and his answer to both was, that while the heir male, and the heir at law was the same person, he was not *valens agere*. This answer the
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Lords sustained with respect to the negative prescription, but repelled it as to the positive; which, therefore, they found to be run.

The petitioner answers, *2do*, That the pursuers in this case were *valentes agere*; and if the precept of *clare constet* was erroneous, there was an action competent to them, in which they certainly would have succeeded, and which undoubtedly would have interrupted the prescription, *viz.* an action of declarator, that *George Muirhead*, upon the title of the infestment 1711, had no right to dispose of his estate gratuitously, in prejudice of the pursuers, the heirs of his grandfather: And if *George Muirhead* thereafter had not mended the defect in his title, it certainly would have been found, that he could not have made the settlement upon the petitioner.

It is very true, that they could not *agere cum effectu*, so as to have evicted the estate from *George Muirhead*; but this is a *valentia agere* that is not required, otherways every tailzie would be imprescriptible while the person who possessed in fee simple, was likewise the heir of entail, which might happen to be the case for hundreds of years. But this objection to the prescription of entails has been overruled as often as it has been made; particularly, in the late cases of *Douglas of Kirkness*, and *Aiton of Kinnady*, where it was thought sufficient that the heir of entail was *valens agere*, to get the entail recorded, or to oblige the possessor to make up his titles in terms of the entail, tho' not to evict the estate. And the same was found in the case of *Achluncart* above mentioned: " That tho' the next heir of entail had " not the *jus exigendi et succedendi*, yet he had *jus agendi*, " and might have pursued a declarator on the bond of tail- " zie, to perfect it in his favours."

The case of *Gray contra Smith*, decided 8th November 1751, was quoted for the pursuers, where it was found, that a settlement of an estate having been made in favours of
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of the heir male, but without any limitation or prohibition to alter, and the heir male having chosen to make up his titles upon the investiture, which was in favours of the heir at law, he did not upon that title acquire by prescription a right to the estate descendible to heirs whatsoever, so that the right of succession of the heir male would be excluded.

But it is answered, *imo*, That the court was considerably divided in that case: And indeed it must appear pretty extraordinary, that a man by possession for forty years, should work off the limitations of an entail, by which he was bound not to alienate, and yet should not do what is less, that is, acquire a right to an estate, so as to make it descendible to his heirs at law, in the ordinary course of succession, without any act or deed of his.

But, *2do*, The case there was different from the case here, in this respect, that the deed of settlement was directly upon the heir male, who made up his titles upon the investiture in favour of the heirs at law, so that he had two rights to the estate in his person, and both unlimited, one, a personal right to the lands by the deed of settlement, and the other, a real right made up by service and investiture upon the old investiture: And the great argument there, which moved the court, was, that there could be no *adjectio domini* by the possession upon his investiture, as he had already an absolute right to the estate in fee simple by the deed of settlement. But this argument, your Lordships see, will not apply here, as *George Muirhead*, if the precept was erroneous, had no right to the estate, neither real nor personal, but what he acquired by positive prescription.

It was further said for the pursuers, that if the vassal in this case has acquired by prescription a right to the property, the Earl of *Wigton* who granted the precept of *clare*

constat in the 1711, must likewise have acquired a right to the superiority.

But the prescription of the superiority and of the property are two things quite distinct. Suppose the Earl of *Wgton* had granted a charter of these lands to *George Muirhead* holding of the Earl, *George Muirhead*, upon that charter and infeftment, would have acquired by prescription the property, *contra omnes mortales*; but the Earl, in order to acquire the superiority by prescription, must not only have had the possession of it by uplifting feu duties, or such other exercises of the right, but he must have shown a proper title for the prescription. For tho' he might give a title to his vassal, yet he certainly could not give a title to himself by his own deed; and, therefore, he would be obliged to show some antecedent right he had to the lands.

May it therefore please your Lordships to alter your interlocutor above recited, and to find that George Muirhead, and the petitioner his successor, having possessed forty years upon a proper title, have thereby acquired a right to the lands by the positive prescription.

According to justice &c.

JA. BURNET.

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